

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

FALCON PRESS PUBLISHING COMPANY

Employer

and

Case 19-RC-13763

MONTANA DISTRICT COUNCIL OF LABORERS,
LOCAL 254, affiliated with LABORERS' INTERNATIONAL
UNION OF NORTH AMERICA, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All employees employed by the Employer at its 1700 National, Butte, Montana facility; excluding guards and supervisors as defined in the Act.

The unit description is in accord with the stipulation of the parties. It includes, inter alia, the administrative assistant, Kristy Krause and a high school student, Matt Reighard; and an individual who shuttles mail between the warehouse and other Butte facilities. The parties stipulated to the exclusion of Jason Schilling, warehouse manager.

The Employer is engaged in the publishing and distribution of books, with several Butte, Montana facilities, including a warehouse, the only facility involved in this proceeding. The parties stipulated, inter alia, to the unit and a voting eligibility date. The sole issue¹ left following the filing of briefs is the supervisor status of assistant warehouse manager Bill Frye; the Petitioner contends he is a statutory supervisor, while the Employer contends that he is an employee.

Facts

The Employer has several facilities in the Butte area. The National facility involved herein serves as a warehouse. Books are shipped to the warehouse and stored. As orders are received, the appropriate book is picked from the shelves, wrapped and shipped. The administrative assistant, besides handling receptionist and typing duties for the warehouse manager, enters “picks” into the system; they are sorted in the warehouse into areas and priorities. Warehouse employees pick and wrap the books, which are then shipped. One employee specializes in processing returns. It is clear from the record that the work involved is highly routinized and generally not highly skilled, as exemplified by the fact that most employees start at minimum wage with no fringe benefits.

Frye’s duties include the sorting of the pick instructions into specific warehouse groupings and placing the higher priority orders at the front of the pile. He spends perhaps 50% of his time physically picking orders along with the rest of the warehouse crew. Frye is generally the individual who will handle the paperwork with the small-package shipping vendors.

Frye is the assistant warehouse manager. He is in the warehouse full-time; his boss, the warehouse manager, is “on the floor” about 20% of his time. Frye substitutes for the latter when he is on leave or otherwise missing from the warehouse for a day, but this has happened about eight times in the last half year. The record does not reflect what additional authority he has in the warehouse manager’s absence, and whether that would increase if Schilling were absent for, say, a full week (something which has not yet transpired). Beyond the foregoing duties, Frye serves as a source of knowledge about the warehouse and its operations, and sees to it that the work gets done. He will, and frequently does, tell employees to work faster when they are behind.

Job interviews are conducted by Warehouse Manager Schilling in Frye’s presence. The latter may ask some questions, but generally is not actively involved in the interview. Schilling selects the top 2-3 applicants, asks Frye for his opinion, and makes the hiring selection. Frye could initiate a written warning by writing one up and giving it to Schilling. Schilling would sign the document, then have a session with the employee in Frye’s presence. The record does not reveal whether Schilling merely adopts the recommendation by signing the warning, or whether he first must be convinced, or whether he uses the employee interview as a means to

¹ On brief, the Employer abandoned a claim that the various employees were temporary and/or that no election should be conducted.

obtain “all the facts” before making his decision. There is no formalized disciplinary procedure with a set number of increasing penalties leading to discharge. For any discipline exceeding a written warning, it appears that Frye would have lesser authority. His maximum disciplinary authority would be, if he were filling in for the warehouse manager some day, to send a truly difficult employee home for the day if things were “getting out of hand.” Schilling would independently review the matter the next day and decide what, if anything, to do.

Schilling assigns employees work, especially if they have run out of same. If there is not enough work to complete the day, Schilling will decide to send some employees home. He or Frye seeks volunteers or a consensus about who should/would go. It appears that if there were no agreement, Frye could select someone. There have been no formal evaluations. Frye lacks authority to decide if overtime is necessary; Schilling makes that decision and selects the workers. A decision to have a layoff would be made by Schilling, who would attempt to follow seniority as the selection method.

Frye is paid a salary and receives health benefits and a 401(k) plan, as does Schilling. However, there are some employees clearly in the unit who also receive these benefits, albeit few. The record does not reflect any additional perks for Frye, nor does it reflect what his pay rate is if reduced to an hourly basis.

Decision

The burden is on the party alleging supervisory status to establish same. Based upon the entire record, I find insufficient evidence to find Frye to be a statutory supervisor. Rather, he appears to be simply a leadman or “straw boss” without true supervisory authority. While he does receive fringe benefits and likely a higher salary than other conceded unit employees, these are merely secondary indicia of supervisory authority; one must possess at least one of the statutory indicia coupled with the exercise of independent judgment to meet the statutory definition. None is present herein. The burden has not been met. Frye is a leadperson whose assistant warehouse manager title does not require true independent judgment to the extent that he possesses any of the statutory indicia. Accordingly, I find that Frye is a unit employee and shall include him in the unit.²

There are approximately 9 employees in the unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed *as of March 5, 1999*,³ including employees who did not work during that period because they were ill, on

² His different remuneration level is not sufficient to destroy his community of interest with the rest of the unit, especially since at least one other employee whom the Union stipulated into the unit receives fringe benefits as well.

³ This date is by stipulation of the parties.

vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Montana District Council of Laborers, Local 254, affiliated with Laborers' International Union of North America, AFL-CIO.

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision 4 copies of an election eligibility list, containing the alphabetized full names and addresses of all the eligible voters must be filed with the undersigned who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Seattle Regional Office, 2948 Jackson Federal Building, 915 Second Avenue, Seattle, Washington, on or before March 19, 1999. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

NOTICE POSTING OBLIGATIONS

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of three working days prior to the date of election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive

Secretary, 1099 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by March 26, 1999.

DATED at Seattle, Washington, this 12th day of March, 1999.

/s/ PAUL EGGERT

Paul Eggert, Regional Director
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, Washington 98174

177-8580-2700